No. 06-15[illegible] 2007

In the
Supreme Court of the United States

NATASHA LATHAM,
Petitioner,

v.

THE STATE OF MICHIGAN,
Respondent.

On Petition for a Writ of Certiorari to the Michigan Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

I. DID THE MICHIGAN COURTS FAIL TO APPLY THE LEGAL STANDARDS ESTABLISHED BY THIS COURT TO EVALUATE PETITIONER'S REQUEST FOR AN EVIDENTIARY HEARING TO PROVIDE RECORD SUPPORT FOR HER CLAIM SHE WAS DEPRIVED OF HER RIGHT TO APPEAL BY THE INEFFECTIVE REPRESENTATION OF HER FIRST APPELLATE ATTORNEY, WHO FAILED TO PROPERLY REQUEST AN EVIDENTIARY HEARING IN SUPPORT OF PETITIONER'S CLAIM SHE WAS DEPRIVED OF A REASONABLE PROBABILITY OF ACQUITTAL BY THE INEFFECTIVE REPRESENTATION OF HER TRIAL COUNSEL, WHO FAILED TO PRESENT PETITIONER'S DEFENSE AND REFUSED TO PERMIT HER TO TESTIFY; WHERE A PROPERLY SUPPORTED REQUEST FOR SUCH AN EVIDENTIARY HEARING WAS FIRST PRESENTED TO THE STATE APPELLATE COURT ON MOTION FOR RECONSIDERATION, AND SUBSEQUENTLY DENIED BY THE STATE COURTS AT EVERY LEVEL, IN VIOLATION OF U.S. CONST, AMS. V, VI AND XIV?

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PETITION FOR WRIT OF CERTIORARI

Petitioner Natasha Latham ("Petitioner" or "Ms. Latham"), respectfully prays that a Writ of Certiorari issue to review the February 27, 2007 Order of the Michigan Supreme Court, *People v. Natasha Latham*, 477 Mich. 1037; 727 N.W.2d 609 (2007) (App. A), denying Petitioner's timely filed Motion for Reconsideration of the November 29, 2006 Order of the Michigan Supreme Court denying Petitioner's timely filed Application for Leave to Appeal, *People v. Natasha Latham*, 477 Mich. 947; 723 N.W.2d 847 (2006) (App. B).

OPINIONS AND ORDERS BELOW

On March 31, 2003, Petitioner was jury-convicted of one count of Assault with a Dangerous Weapon (Felonious Assault, or "FA"), contrary to MCL 750.82; MSA 28.277, and one count of Possession of a Firearm During the Commission of a Felony ("Felony Firearm"), MCL 750.227b; MSA 28.424(2), in the Wayne County Circuit Court, Criminal Division. On April 25, 2003, Petitioner was sentenced to a mandatory two year prison term for Felony Firearm, and to a consecutive term of one year probation for FA (App. H). The trial court then *sua sponte* ordered Ms. Latham released on bond pending appeal, finding she posed no threat to the community; she has remained free on appeal bond during all the appellate proceedings which have ensued. The trial court will on longer have authority under Michigan law to permit Ms. Latham to remain on bond pending appeal once this Court concludes its review of this case. *People v. Jones*. 467 Mich. 301; 651 N.W.2d 906 (2002). Thus, a mandatory two year prison term looms before her if this Petition is unsuccessful.

On November 16, 2004, the state Court of Appeals issued an Opinion affirming Ms. Latham's convictions in all respects (App. G). On January 7, 2005, her timely filed Motion for Reconsideration was denied (App. F). On August 30, 2005, the state Supreme Court denied her timely filed Application for Leave to Appeal. *People v. Natasha Latham*, 474 Mich. 855; 702 N.W.2d 582 (2005) (App. E).

On October 5, 2005, Ms. Latham timely filed in the trial court Motions for Relief from Judgment, for a New Trial, and for an Evidentiary Hearing on the issue of ineffective assistance of counsel. On November 4, 2005, the trial court issued an Order denying all Petitioner's motions (App. D). On July 10, 2006, the state Court of Appeals issued an Order denying the Petitioner's timely filed Application for Leave to Appeal, which included a request for a remand for an evidentiary hearing on the issue of ineffective assistance of counsel (App. C). Petitioner then timely filed an Application for Leave to Appeal in the Michigan Supreme Court, followed by a Motion for Reconsideration, both of which included a request for a remand for an evidentiary hearing on the issue of ineffective assistance of counsel; leading to the issuance of the two Orders identified above; an Order denying Leave to Appeal (App. A), and an Order denying Reconsideration (App. B), from which this Petition is filed.

STATEMENT OF JURISDICTION

Petitioner seeks review of the February 27, 2007 Order issued by the Michigan Supreme Court, *People v. Latham*, 477 Mich. 1037, *supra* (App. A), denying the Petitioner's timely filed Motion for Reconsideration of the November 29, 2006 Order of the Michigan Supreme Court denying Petitioner's timely filed Application for Leave to Appeal, *People v. Latham*, 477 Mich. 947, *supra* (App. B), from the

July 10, 2006, Order of the Michigan Court of Appeals (App. C), and from the November 4, 2005 Order of the trial court (App. D), identified *supra*.

STATUTORY PROVISION INVOLVED

This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

STATEMENT OF THE CASE

A. Procedural History

Petitioner was charged with one count of Felonious Assault and one count of Felony Firearm, following a verbal argument between her boyfriend, Duane Berry ("Berry) and her neighbor Michelle Wilson ("Wilson") on November 13, 2002, outside two apartment buildings in Detroit (App. I, ¶¶ 19, 47-56). After the argument ended, Wilson filed a false police report claiming Ms. Latham pointed a gun at her and threatened to kill her. Although convicted by jury, Ms. Latham has always asserted her actual innocence of these charges (App. I, ¶¶ 4, 5, 17, 18, 129, 130). Ms. Latham prepared an extensive defense for her trial lawyer, Brian Gagniuk (Gagniuk), who agreed to present her defense but then rested without presenting any defense at all (App. I, ¶ 4-15) (T, I, 80-84; T, III, 5). Petitioner was then convicted as charged.

Petitioner then retained her first appellate attorney, Delphia Burton ("Burton") to represent her at sentencing and on direct appeal of right. Petitioner and Berry gave her all of their information about the case, including Gagniuk's many deficiencies (App. I, ¶¶ 128-129; App. J, ¶ 73). Burton told the trial court at sentencing she would file a motion for new

trial based on ineffective assistance of trial counsel if review of the trial transcripts supported it (4/25/03, 13-15). However, she never filed such a motion even though the "brief" she ultimately filed in the state Court of Appeals raised such claims. In fact, Burton's "brief" violated applicable law; the issues raised were based on facts not of record, yet no Affidavits were submitted in support; and Burton filed no post-conviction motion in the trial court for an evidentiary hearing on the issue of ineffective assistance of counsel, and filed no motion in the Court of Appeals for a remand for such an evidentiary hearing. All of Ms. Latham's subsequent post-conviction pleadings have requested an evidentiary hearing on the issue of ineffective assistance of both trial and first appellate counsel. All such requests have been denied by the Michigan Courts. As a result, Ms. Latham has never had such a post-conviction evidentiary hearing, a hearing critical to her ability to obtain real appellate review of her case.

After Burton filed the "brief" in the direct appeal, the relationship between her and Ms. Latham broke down, in part because Ms. Latham, dissatisfied with the "brief", asked Burton to file a supplemental brief, which was never done. In addition, Burton told Ms. Latham she was changing her legal practice; she would no longer be handling criminal appeals (App. I, ¶¶ 130, 132-139; App. P).

Ms. Latham then retained undersigned counsel, who substituted as her attorney in the state Court of Appeals prior to decision. New counsel learned upon review of the record how little had been done by the previous attorneys. New counsel had to:

A. Order additional transcripts of the trial court proceedings, including important sections of the trial transcripts;

B. Locate and interview many witnesses, one of whom proved very difficult to locate and speak with; and

C. Research the factual issues and obtain Affidavits and Offers of Proof to properly support a Motion to Remand for an evidentiary hearing on the issue of ineffective assistance of counsel, and draft a proper Supplemental Brief on Appeal to replace Burton's Brief.

Burton had failed to order transcripts of the following trial proceedings: voir dire, opening statements, jury charge, jury deliberations; sentencing; or of pretrial proceedings held on: November 27 and December 4, 2002; January 10, and March 14 & 20, 2003. New counsel promptly ordered these transcripts, causing further delay in the appeal. And when the complete trial transcripts were obtained, new counsel discovered numerous errors of record that Burton had overlooked because she failed to order the complete record. New counsel also discovered Burton had never filed a post-conviction motion for new trial or for an evidentiary hearing in the trial court on the issue of ineffective assistance of trial counsel, and had never filed a motion in the state Court of Appeals to remand for such a hearing. Burton had done nothing to obtain Affidavits documenting the evidence that should have been offered at trial by trial counsel, but was not. Further, it was obvious that the "brief" Burton filed was hopelessly inadequate to meaningfully present her issues to the appellate Court:

A. The first issue in Burton's "brief" argued that Petitioner was denied a fair trial because trial counsel denied her the right to testify. This issue could not be addressed on the existing record; no affidavit of the defendant was submitted in support; no evidentiary hearing was requested to establish that trial counsel's failure to call Petitioner to testify was not a matter of trial strategy. The state appellate Court denied relief on this issue precisely because there was nothing in the record (and no offer of proof) that Ms. Latham wanted to testify (App. G, at 1).

B. The second issue in Burton's "brief" argued Ms. Latham received ineffective representation from trial counsel, who failed to present her defense, and did not allow her to testify. This issue also could not be addressed by the state appellate Court on the existing record. No Affidavits were filed summarizing what Ms. Latham and other witnesses could have testified to, or why they did not testify; no request was made for an evidentiary hearing to establish that trial counsel's failure to present a defense or to call Petitioner to testify were not matters of trial strategy. The state appellate Court denied relief: "Defendant has failed to provide support for the majority of these claims." (App. G, at 3).

C. The third issue in Burton's "brief" argued Ms. Latham was deprived of a fair trial because of improper prosecutorial comments on her failure to testify. The state appellate Court noted that trial counsel failed to object to these prosecutorial comments, which were thus reviewed (unsuccessfully) under the more stringent "plain error" standard (App. G, at 2). Burton's Brief should have, but did not,

argue that trial counsel provided ineffective assistance by failing to object to the improper prosecutorial remarks; and should have requested an evidentiary hearing to establish the failure to object was not a matter of trial strategy. Thus, the state appellate Court did not address this issue.

D. The final argument in Burton's "brief" asserted Ms. Latham was deprived of a fair trial by the cumulative effect of the previously identified three errors. However, since none of the previous three issues were supported by the record, there could not possibly be cumulative error. The Michigan Court of Appeals so ruled (App. G, at 3-4).

Also, Burton's "brief" contained numerous factual allegations supported only by the phrase: "upon information and belief, " which were not supported by the record, or by any Affidavits. Finally, despite having completely failed to timely request an evidentiary hearing in the trial court, Burton's "brief" did, in the "relief requested" section, request a remand for an evidentiary hearing; but this request was doomed to failure, as unsupported by any Affidavits or Offers of Proof.

The deficient presentation in Burton's "brief" represented clear-cut ineffective assistance of appellate counsel. This "brief", for practical purposes, guaranteed Ms. Latham's convictions would be affirmed, resulting in an employed, religious young woman with no prior police contacts, from a strong, law- abiding family, having to serve a mandatory two-year prison term for a crime she denies having committed, where her trial attorney completely failed to present her defense, and then rested the case without letting her testify to defend herself, and where her first appellate counsel failed to

present on appeal the necessary Affidavits and Offers of Proof to establish the deficient representation of trial counsel, and the resulting prejudice.

Although new counsel worked diligently to perform the investigation of this case that should have been conducted by trial counsel and by first appellate counsel, and to obtain Affidavits and Offers of Proof to file in the state Court of Appeals in support of a motion to remand for an evidentiary hearing on the issue of ineffective assistance of trial and first appellate counsel, this work was not quite completed as of October, 2004. On October 21, 2004, the state Court of Appeals unexpectedly issued a Notice stating this case was being considered for accelerated decision without oral argument. Under these circumstances, new counsel would not be able to properly perfect Petitioner's appeal of right, and would be unable to provide her with effective assistance of appellate counsel; because he did not yet have all the necessary Affidavits, Offers of Proof, and transcripts. New counsel intended to file a motion to remand in the state Court of Appeals as soon as possible after receipt of the last notarized Affidavit from Virginia Adams (App. L), who is a critical witness who had moved; who was extremely difficult to locate and communicate with; and with whom it was proving extremely difficult to meet with in order to obtain a signed Affidavit. Further, the transcripts of the proceedings on December 4, 2002, January 10, and March 14 and 20, 2003 had still not been filed.

In order to make the state Court of Appeals aware of the status of his investigation of this case, and of the need to file a fully supported and documented motion to remand, and to also file an amended brief on appeal to replace Burton's inadequate "brief", new counsel filed five Motions in the state Court of Appeals on Nov. 1 & 2, 2004: (1) to withdraw

Burton's inadequate "brief"; (2) to permit the filing of the additional transcripts Burton failed to order; (3) for permission to file Ms. Latham's new brief on appeal and motion to remand within 21 days of receiving the final offers of proof in support of the issue of ineffective assistance of trial and appellate counsel; and (4) to permit oral argument. These motions represented that the offers of proof which were being obtained would establish: that trial counsel's representation was deficient in failing to present a significant defense where there was available evidence in support of a defense; that trial counsel promised he would present exculpatory evidence to show Ms. Latham's innocence, and did not; that he failed to inform Ms. Latham he was abandoning her defense; that he told Ms. Latham she would testify, and then rested the defense case without her testimony or consent.

On November 9, 2004, the state Court of Appeals denied all Ms. Latham's motions. On November 16, 2004, that Court issued its Opinion (App. G) rejecting all Burton's inadequately supported arguments, and affirming Ms. Latham's convictions.

On December 7, 2004, new counsel timely filed a Motion for Reconsideration in the Court of Appeals, based on all the sought-after affidavits and transcripts. Exhibit 1 in support of this Motion was a proposed Brief in Support of Motion to Remand, with offers of proof attached, which included a properly supported request for a remand for an evidentiary hearing. The offers of proof demonstrated the strong evidence that Ms. Latham is innocent; clearly established she did not receive effective assistance from either Gagniuk or Burton; and established the need for a remand for an evidentiary hearing on the issue of the ineffective assistance of both trial and appellate counsel. The offers of proof

included Affidavits from Ms. Latham (App. I); from her boyfriend and critical witness, Duane Berry (App. J); from Virginia Adams, an eyewitness to part of the incident who was never investigated by Gagniuk or Burton (App. L); from Detroit Police Officer Kenneth Emerson, who observed the complainant's attempt to confront and pick a fight with Petitioner in a 36th District Court elevator (App. M); from Aprel Roby (App. K), who also observed the incident in the elevator; and from several of Petitioner's relatives (Apps. N,O). The affidavits and other documentary evidence demonstrated Petitioner did not receive a fair trial.

The state Court of Appeals failed to consider the merits of the motion to remand or the offers of proof. On January 7, 2005, the that Court issued a one line Order denying Petitioner's Motion for Reconsideration without comment (App. F). The Michigan Supreme Court then denied Leave to Appeal (App. E).

On October 5, 2005, Petitioner filed in the trial court a motion for relief from judgment, for a new trial, and for an evidentiary hearing, with brief and Offers of Proof in support. On November 4, 2005, the trial court issued an Order denying Petitioner's motions in all respects (App. D). As explained above, leave to appeal was subsequently denied by both the Michigan Court of Appeals and the Michigan Supreme Court (Apps. A, B, C). All these Courts also rejected Petitioner's accompanying request for an evidentiary hearing on the issues of ineffective assistance of trial and first appellate counsel.

B. <u>Combined Facts from the Trial Record and from Offers of Proof</u>

This summary references both the trial evidence and facts supported by the attached Offers of Proof, to assist this Court

in evaluating the merits of Ms. Latham's request for post-conviction relief, and for a remand for an evidentiary hearing.

In May, 2002, Petitioner began staying regularly at the apartment of her brother, Tony ("Tony") in Detroit; he wanted his apartment to appear occupied when he was away, which was often. Petitioner's boyfriend, Duane Berry ("Berry"), often stayed with her (App. I, ¶¶ 20-22; App. J, Duane Berry Affidavit, ¶ 3).[1] At that time, Berry drove a Porsche Boxter subleased from a friend, Matthew Ducco. Berry was concerned about damage to this car (App. I, ¶ 62; App. J, ¶ 11). The Apartment complex management did not seem concerned about residents parking on a grassy area or on a concrete slab when the parking lot was full, so Berry parked in these areas when necessary (App. J, ¶ 13; App. I, ¶¶ 29, 33).

1. <u>Incidents that led up to November 13, 2002.</u>

In June 2002, Tony was approached by the Complainant, Michelle Wilson ("Wilson"), who told him "his girlfriend" was having "all types of men" over. The brother told her the

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[1] The first appellate attorney did not order the complete trial transcript; just the testimony and closing arguments. New appellate counsel ordered the voir dire, opening statements, jury instructions, verdict, and sentence. Thus, although the trial took place on two days, March 27 and 31, 2003, there are four volumes of trial transcripts. In this Petition, the voir dire and concluding proceedings on March 27 are referred to as "T, I;" the remaining proceedings on that day as "T, II." The initial proceedings on March 31 will be referred to as "T, III," and the final proceedings on that day as "T, IV." The March 20, 2003 search & seizure suppression hearing will be referred to as "Mot." The sentencing hearing on April 25, 2003 will be referred to as "S."

"girlfriend" was his sister. Tony later told Petitioner what Wilson had said, that Wilson appeared angry with her, and that Wilson lived in the adjacent building. Petitioner had never met Wilson, and wondered what her concerns were; but, deciding she was nosy or jealous, Petitioner brushed it off (App. I, ¶¶ 23, 25-28).

Petitioner then learned Wilson had begun closely watching her and Berry's comings and goings from her window. One time, Berry saw Wilson watching him while she was wearing only her underwear. Wilson's behavior demonstrated an obsessive, jealous hatred, primarily for Ms. Latham, but for Mr. Berry as well. (App. J, ¶¶ 6-24; App. I, ¶¶ 16-17,23-45).

The apt. management sent Tony a letter stating someone had reported he had unauthorized occupants living in his apt., who were parking illegally on the grass and sidewalks. The letter warned these infractions were grounds for eviction. Petitioner and Berry logically assumed Wilson made this report. (App. I, ¶¶ 29-30; App. J, ¶ 14).

In October, Wilson began to regularly park her car to block Berry's Porsche in the parking lot. Usually he was able to maneuver and get out without damaging his own car. (App. J, ¶¶ 15, 17). From November 10-13, 2002, Wilson began a campaign of harassment; she repeatedly started arguments with Berry, tried to draw Petitioner into the conflict, and then challenge Petitioner to a fight. Petitioner always walked away from these provocations. (App. I, ¶¶ 31-32, 35, 41-43, 88; App. J, ¶¶ 10, 16-42).

Three incidents occurred on November 10. First, Petitioner and Berry went outside, and found Wilson's car parked blocking in Berry's Porsche; Wilson refused to move

her car, and initiated an angry profane verbal exchange with Berry. Petitioner told Berry to get in the car and not bother with Wilson. Berry had to drive over a curb to get out of the lot (App. I, ¶¶ 32-35; App. J, ¶¶ 18-20).

Petitioner and Berry returned later, and Berry parked on the grass below the apt. window. Berry later looked outside and saw Wilson standing behind his car, writing something. Wilson told Berry, provocatively, she was writing down his license plate number "in case she needed it". Wilson and Berry began to argue; Petitioner went to the window and yelled to Wilson to mind her own business. Wilson said she would have the car towed. Outraged, Berry shouted, "If you touch my car, I'll shoot the shit out of you." Wilson, undaunted, responded, "You're not the only one with a gun." Then, Wilson yelled to Petitioner (not to Berry) to "come down and say that shit". Ms. Latham ignored Wilson (App. J, ¶¶ 21-22;App. I, ¶¶ 36-41).

Later, Petitioner and Berry heard a noise, and looked outside. They saw Wilson and two other women staring up at their apt., gesturing and taunting Petitioner to come outside. One woman had a vicious dog, and the other was wielding a baseball bat. Petitioner and Berry ignored them. A neighbor, Virginia Adams, also witnessed this incident. (App. J, ¶ 23; App. I, ¶¶ 42-44; App. L, Affidavit of Virginia Adams, ¶3).

On Nov. 12, Petitioner looked outside and heard Wilson telling Willie, the apt. maintenance man, and Osborne Walker, another tenant, her version of the Nov. 10 events. Wilson complained Petitioner did not live in the apt., and Berry parked his car improperly. Willie said the next time, he would put a "no parking" sticker on the car, and also said: "[W]e got to get them out of here." Later that night, Berry

arrived at the apt. When he parked on the grass underneath the window; there was no sticker on his car. He and Ms. Latham went to bed. (App. I, ¶¶ 45-47; App. J, ¶ 25).

2. Alleged Offense on November 13, 2002, and Ms. Latham's Arrest.

On November 13, 2002, Petitioner and Berry got up at 8:30 a.m. to get ready for work. Berry looked out and saw a large "no parking" sticker on his car window; he believed Wilson was responsible. Angry, he ran downstairs. Petitioner looked out and saw him scraping the sticker off her car. Petitioner left the window, got her cell phone, and called her job to find out the time of her first appointment. While calling, she looked out the window, wearing her pajamas, and holding her cell phone. She saw Wilson drive up and get out of her car. (App. I, ¶¶ 47-49; App. J, ¶¶ 26, 27).

Wilson and Berry got into a verbal argument about his improper parking. Wilson claimed she knew his name was Matthew and where he lived (information she must have got from an illegal LEIN check of the car's license plate number) (T, II, 7, 14-16) (App. I, ¶ 62; App. J, ¶¶ 11, 27)

Berry and Wilson spoke loudly and profanely at each other; Berry moved towards Wilson; Wilson stood her ground. Wilson admitted she could have gone inside her apt. building, but did not; instead, she called for her boyfriend, Leonard Calhoun ("Sterling"), to come down. (T, II, 7, 16-17; App. I, ¶¶ 49-53; App. J, ¶¶ 28, 29).

Ms. Latham opened her apt. window, in her pajamas and holding her cell phone, when Berry was about four feet from Wilson. Afraid Berry was about to assault Wilson, Ms. Latham yelled, "Don't touch her!" Ms. Latham asserts she

did not have a handgun in her possession. (App. I, ¶¶ 48-53; App. J, ¶¶ 28-36).

Wilson admitted at trial she heard Petitioner "yelling" from the window, but claims she did not know what she was saying. Wilson claimed that Sterling came outside, joined Wilson on Wilson's back porch, and argued with Berry. Wilson claimed she was looking at Berry when Sterling allegedly said: "she got a gun in her hand." Wilson claimed she turned and saw Petitioner, standing on her own porch, pointing a gun at her, and threatening to kill her. Wilson repeatedly insisted the two back porches were only three feet apart. Wilson claimed she did not see Petitioner at first because she was looking at Mr. Berry, who was yelling a threat to her about not touching his car (T, II, 8-9, 18-21; App. I, ¶¶ 69, 70)

Wilson first testified that Sterling "snatched her inside [their] doorway." (T, II, 8-10, 19). She then changed her story, and claimed she stayed on her porch, watching Ms. Latham go upstairs, open her apt. window and "hang" out of it, yelling and waving a gun. (T, II, 10, 18-20; App. I, ¶ 70). After Petitioner yelled to Berry, Sterling came outside in his boxer shorts, and stood on his back porch. Wilson then went towards her porch, while yelling at Berry. (App. J, ¶ 21, 31).

Ms. Latham and Berry have a vastly different version of what happened, which the jury never heard. For example, Ms. Latham has measured the porches as about 40 feet apart, not the "three feet" claimed by Wilson (App. I, ¶¶ 47-57, 69; App. J, ¶¶ 26-38). Further, after yelling to Berry from the window, Petitioner never went outside at all; she never had a gun; she never threatened Wilson with a gun (App. J, ¶¶ 32-35; App. I, ¶¶ 66, 69,71). Ms. Adams, the neighbor who did not testify, heard noise and looked outside. She did not hear

anyone mention a gun, and she did not hear Petitioner make any threats. Most importantly, she is sure Natasha Latham did not go downstairs anytime before the police arrived, as alleged by Wilson (App. E, ¶¶ 2-8).

Berry confirms Ms. Latham did not come outside with a gun; she would first have had to get dressed, find a gun, figure out how to pick it up, run downstairs, open the steel security door, step on the porch, hold the gun and threaten to kill Wilson. Wilson was standing near both Berry and Sterling, so Petitioner would have had to point the gun at Berry as well. (App. J, ¶¶ 32-35; App. I, ¶¶ 69-72).

Had Petitioner come outside with a gun, Berry would have immediately intervened, because he knows she has no experience with guns; he would have made sure she put the gun down. Ms. Latham would never point a gun at anyone—certainly not in the direction of three people—including her own boyfriend (App. I, ¶¶ 70, 71, 77-81 App. J, ¶ ¶ 32-34; App. N, S. Carlisle Affid., ¶¶ 7-11, 14; App. O, G. Carlisle Affid., ¶¶ 6-13; App. K, April Roby Affid.; ¶¶ 5-9). Ms. Latham was far too afraid to threaten Wilson (or anyone else) in any way, especially after Wilson revealed on November 10 that she herself had a gun (App. I, ¶¶ 18, 70, 71, 80; App. J, ¶ 34).

After Wilson headed for her porch, Berry looked at Sterling and said, "Dog, you better check her [Wilson]". Sterling replied, "I ain't checkin' shit." Berry then returned to the apt. With that, the verbal argument was over; it had never become threatening or assaultive. (App. J, ¶¶ 27-38; App. I, ¶¶ 47-56).

Berry returned to the apt., and told Petitioner to call management about Wilson. Ms. Latham said she was already

on the phone. Berry went to his car to leave. Wilson called out her window: "Where are you going Matthew? Wait 20 minutes!" Berry gave her the finger and left. (App. J, ¶¶ 37, 38; App. I, ¶¶ 57-58, 61-63).

Petitioner heard the yelling as Berry left. She called Judy at the apt. office. While explaining about Wilson's harassment, Berry called Petitioner on her other line, and told her what Wilson had said, which indicated Wilson had called the police. Judy then told Petitioner to stay away from Wilson. Petitioner called Berry to tell him management downplayed the situation. (App. I, ¶¶ 58-65; App. J, ¶¶ 39, 40. After talking with Berry, Petitioner did not run away or leave the apartment– she had not committed a crime. She got in the shower to get ready for work. (App. I, ¶¶ 66-68).

3. False Police Report, Police Arrival, and Search and Seizure.

Wilson called the police and falsely reported Petitioner came outside, pointed a gun at her, threatened to kill her, then went inside and leaned out her window, waving the gun around. (T, II, 11; App. I, ¶¶ 69, 70). Two Police Officers (P.O.'s), Patrick Jones and Patrice Roman, arrived a few minutes later. Petitioner's account of what happened when the P.O.'s arrived differs from the officers' version. But trial counsel did not call Petitioner to testify to contradict their testimony either at the pretrial Suppression Hearing or at trial. (App. I, ¶108).

Petitioner attests that the P.O.'s entered here apartment without permission while she was in the shower, starting yelling at her, and searched her apartment without permission. Petitioner denied pointing in the direction of a mattress on the living room floor and stating there might be a gun there. She

did not know about any gun. The P.O.'s told Petitioner about Wilson's police report; she explained to them Wilson's report was false, and explained what really happened. She told them about Wilson's harassment and obsessive behavior. While she explained, she saw P.O. Roman searching the apartment, and eventually look under the mattress and come up with a handgun. Petitioner asked to have the gun checked for her prints, but this was never done. Petitioner was arrested and taken to the police car (App. I, ¶¶ 72-84).

P.O. Jones testified at the Suppression Hearing that they first met with Wilson. They then met an apt. manager who unlocked the door to Petitioner's apartment. He claimed Petitioner invited them in, agreed to speak with them, and they asked if there were any weapons in the apartment: "for officers' safety." Petitioner allegedly responded there "could be", but if there were, they did not belong to her. She allegedly pointed to the general area of a mattress on the floor, saying there could be a weapon "right there." They found a handgun, and arrested her (Mot, 8-16, 24-26, 30). Jones then changed his story and said the P.O.'s did not speak to Petitioner about weapons when they first arrived, but only after she was allowed to get dressed. Jones then admitted he did not remember where they found the gun. (Mot, 21-32). Latham attests Jones' story is false (App. I, ¶¶ 72-86).

4. <u>Additional Harassment by Wilson After Arrest of Ms. Latham</u>

After her arrest, Wilson's harassment of Petitioner continued. On November 27, 2002 Ms. Latham and Berry attended her preliminary examination in 36th District Court. In the hallway before court began, Wilson and some friends made loud, crude profane remarks at them. Petitioner asked Berry to leave, because he was getting angry. She called a

good friend, Aprel Roby, to come be with her in Court, which she did (App. I, ¶¶ 89-90; App. J¶¶ 43-44; App. K, ¶¶10-11).

Petitioner waived the exam. When the court addressed bond, Wilson falsely claimed Ms. Latham and Berry were frightening her by watching her, threatening her and harassing her everyday (PE, 5-8). The Judge believed these untrue allegations, and ordered Petitioner to have no contact with Wilson, but did not order Wilson to have no contact with her. (PE, 11-12; App. I, ¶¶ 91-93).

When court adjourned, Petitioner, Ms. Roby and a man in a suit stepped into an elevator together (App. I, ¶ 93; App. K. ¶¶ 11-12). Just moments after Wilson told the Judge she was terrified of Petitioner, she ran up with three friends, grabbed open the elevator doors, got in and began making more crude, profane and nasty remarks; this harassment continued into the first floor lobby. The man in the suit was Detroit Police Inv. Kenneth Emerson; who provided an affidavit and was available to testify at trial. (App. I, ¶¶ 96-102; App. K, ¶¶ 8-15; App. M, ¶¶ 7-15).

On December 4, 2002, Ms. Latham requested a Personal Protection Order ("PPO") against Wilson, and a judge signed it. Thinking the PPO shielded her from violating the District Judge's order, Ms. Roby drove Petitioner to Tony's apartment to pack her things. Wilson called the police and falsely reported Roby and Petitioner harassed them when they arrived at the apt. Petitioner told the officers she had not harassed Wilson, and explained that Wilson made up lies about her, stalked her and wanted to hurt her. After checking their identifications and the PPO, the officers told Ms. Latham and Ms. Roby to leave (App. I, ¶¶ 103-107; App. K, ¶¶ 16-21).

5. Trial Counsel and Trial Proceedings

Gagniuk represented Petitioner at the suppression hearing, but did not allow her to testify she did not consent to the search of her apartment (App. I, ¶ 108). Ms. Latham and Berry met with Gagniuk, explained the history of Wilson's harassment; explained Latham was innocent; identified all the witnesses, including themselves and Adams (App. L), Roby (App. K), and P.O. Emerson (App. M); described the incident at 36th District Court; gave him photos of the apartment complex. Gagniuk claimed he would present Ms. Latham's defense, but did not (App. I, ¶¶ 112-125).

Gagniuk agreed to investigate the case and interview witnesses. But, he did none of these things; he did not discuss character witnesses; and he never explained Petitioner's constitutional rights to her (App. I, ¶¶ 4-14, 60, 69, 112-125; App. J, ¶45-51, 54-62). Ms. Latham told Gagniuk she wanted to testify, and she wanted Berry and all her witnesses to testify (App. I, ¶¶ 4-14 112-125). Gagniuk never followed up; he did not contact even one witness. (App. I, ¶¶ 4, 14, 112-125; App. J, ¶¶ 54-62; App. K, ¶23; App. L, ¶ 16; App. L, ¶ 22; App. N, ¶ 17; App. O ,¶ 15). Gagniuk did not prepare Ms. Latham or Mr. Berry for their testimony, and surprised them both during trial by not calling them (App. I, ¶¶ 113-117; App. J, ¶¶ 64-65).

During voir dire, Gagniuk asked what the jurors would think if Ms. Latham did not testify. Jurors Two and Six said they very much wanted to hear Ms. Latham's testimony (T. I, 38-40). Trial counsel accepted the jury with Jurors Two and Six still on it. (T, I, 62; App. I, ¶ 118). In his opening, Gagniuk told the jury about the prosecutor's case. He the said the trial *was going to be a credibility contest*, but he did not summarize the defense evidence or witnesses. (T, I, 77-79).

He subsequently rested the defense case without calling any witnesses, including Petitioner (T, III, 3).

Wilson's testimony was internally inconsistent, and illogical. (T, II, 9, 17). Gagniuk did nothing to challenge these fictions, although Ms. Latham kept writing notes to him about what to ask (App. I, ¶ 119). Wilson revised her story about the earlier altercations (T, II, 17-18; App. J, ¶ 22). Wilson first said when Sterling saw Petitioner with a gun he snatched her back into their apartment (T, II, 9-10). Then, she realized she should not say that, because she would not have been on the porch to allegedly see Petitioner lean out the apt. window with the gun (T, II, 10, 19-21).

Wilson's boyfriend, Sterling, testified; his testimony was confusing and did not really corroborate Wilson. He did not go outside to talk to the police (T, II, 36-45).

Osborne Walker, another tenant, testified favorably to Ms. Latham. He saw Wilson and Petitioner arguing, one downstairs on her back porch, and the other in her upstairs window. He said Ms. Latham did have something in her hand, but he could not see what it was; he agreed it might have been a cell phone. (T, II, 28-35).

P.O. Roman testified that Ms. Latham answered the apt. door wrapped in a towel, and, when asked if there was a weapon in the apt., allegedly said there might be one near the mattress on the living room floor, but, if there was a weapon there, she had nothing to do with it. Roman looked and found a handgun (T, II, 46-58). Roman said she preserved the gun for fingerprinting, but the gun was never tested for fingerprints (T, II, 50, 52). Gagniuk asked the Court to keep the proofs open until the following day (T, II, 83-84). Gagniuk did not speak to Ms. Latham to either convince her

to waive her right to testify or to prepare her to testify (App. I, ¶ 120-121). The next morning, Gagniuk rested Petitioner's case (T, III, 3). She was afraid to speak up in protest (App. I, ¶ 122-123). The jury convicted Ms. Latham as charged.

REASON FOR GRANTING THE WRIT

I. THE MICHIGAN COURTS FAILED TO APPLY THE LEGAL STANDARDS ESTABLISHED BY THIS COURT TO EVALUATE PETITIONER'S REQUEST FOR AN EVIDENTIARY HEARING TO PROVIDE RECORD SUPPORT FOR HER CLAIM SHE WAS DEPRIVED OF HER RIGHT TO APPEAL BY THE INEFFECTIVE REPRESENTATION OF HER FIRST APPELLATE ATTORNEY, WHO FAILED TO PROPERLY REQUEST AN EVIDENTIARY HEARING IN SUPPORT OF PETITIONER'S CLAIM SHE WAS DEPRIVED OF A REASONABLE PROBABILITY OF ACQUITTAL BY THE INEFFECTIVE REPRESENTATION OF HER TRIAL COUNSEL, WHO FAILED TO PRESENT PETITIONER'S DEFENSE AND REFUSED TO PERMIT HER TO TESTIFY; WHERE A PROPERLY SUPPORTED REQUEST FOR SUCH AN EVIDENTIARY HEARING WAS FIRST PRESENTED TO THE STATE APPELLATE COURT ON MOTION FOR RECONSIDERATION, AND SUBSEQUENTLY DENIED BY THE STATE COURTS AT EVERY LEVEL, IN VIOLATION OF U.S. CONST, AMS. V, VI AND XIV.

Petitioner Natasha Latham had a due process right to the effective assistance of appellate counsel on her first appeal of right. *Evitts v. Lucey*, 489 U.S. 387, 391-92, 397 (1985); U.S Const, Ams. V, VI, XIV. Her rights to due process of

law and to the effective assistance of counsel were violated when she was effectively deprived of her right to appeal under Michigan law by the failure of her first appellate counsel to properly perfect her appeal. *Roe v. Flores-Ortega,* 528 U.S. 470 (2000).

There are two dimensions to the role of effective appellate counsel. One is the ability to obtain a favorable decision by making the adversary system work. For this role, the expert professional's assistance is necessary in a legal system governed by complex rules and procedures before the defendant can even obtain a decision at all, much less a favorable decision. *Evitts supra;* Griffin, *The Right To Effective Assistance of Appellate Counsel*, 97 W. Va. L. Rev. 1 (1994). Appellate counsel must therefore be familiar with all the rules for protecting the right to appeal, the rules of procedure for filing the notice of appeal, for ordering transcripts, and obtaining the record. Then counsel must spot the appellate issues by reviewing the record, determine what issues to raise, decide how to formulate the issues, and find persuasive authority. *Id.*, at 37. Petitioner also had a right to the effective assistance of trial counsel. The essence of a claim of ineffective-assistance of trial counsel is that trial counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was unfair and the verdict suspect. *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *United States v. Cronic*, 466 U.S. 648, 655-657 (1984); U.S. Const., Ams. VI, XIV. Here, trial counsel's representation fell below an objective standard of reasonableness, and there exists a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland, supra,* at 688-689; 694.

Here, the evidence and witnesses which could have been presented at trial, but which were not, are summarized *supra,* and in the attached Affidavits, which were presented to the Michigan Courts in support of Petitioner's request for an evidentiary hearing (Apps. I-P). The challenged actions and inactions of trial counsel here could not have been sound trial strategy. Trial counsel, among other things: failed to present Petitioner's defense, where she had a defense of arguable merit; failed to investigate her defense; failed to prepare for trial; waived her right to testify without her consent; failed to properly advise her; waived her right to present a defense and call witnesses in her favor; and kept two jurors on the jury who expected Petitioner to testify, and then rested without presenting her testimony. He then effectively presented no defense. Ms. Latham's trial was a miscarriage of justice, particularly because she had given trial counsel all the information he would ever need to give her a compelling defense that would have made a difference in the outcome of her trial.

Petitioner had a due process right to testify in her own behalf. U.S. Const. Ams. VI, XIV. The decision as to whether to testify belonged to her, not to counsel. *Rock v. Arkansas,* 483 U.S. 44 (1987); *Faretta v. California*, 422 U.S. 806 (1975). A defense counsel's failure to take the proper and evident steps to protect his client's constitutional rights during a criminal prosecution constitutes ineffective assistance, and/or denies the defendant a fair trial. *Kimmelman v. Morrison,* 477 U.S. 635 (1986).

Petitioner's first appellate counsel identified she did not receive effective assistance of trial counsel in that trial counsel improperly rested her case without permitting her to testify or to present her evidence in defense; in a case in which she had a defense of strong arguable merit. But first appellate counsel

failed to file a motion in the trial court for an evidentiary hearing to create an evidentiary record concerning what Petitioner's testimony and her witnesses' would have been, and to show that trial counsel's failure to present a defense or call Petitioner to the stand could not possibly have been strategic; and failed to file a timely motion in the Court of Appeals to remand for such a hearing. This type of evidentiary hearing has been well-established in Michigan criminal procedure since the case of *People v. Ginther*, 390 Mich. 436, 212 N.W.2d 922 (1973).

Petitioner's first appellate counsel recognized that trial counsel failed to properly represent her; but failed to follow the procedures necessary to perfect the issue. Petitioner's first appellate counsel sought to raise issues in the Brief on Appeal filed in the Michigan Court of Appeals, primarily ineffectiveness of trial counsel, which necessitated expansion of the record, but completely failed to follow the proper procedures to expand the record. First appellate counsel failed to obtain the complete record; failed to investigate the case; failed to obtain proper offers of proof regarding testimony and evidence which should have been presented by trial counsel and was not; and failed to properly request an evidentiary hearing in the trial court, in accordance with Michigan procedural rules, to properly expand the record.

Where, as here, ineffectiveness of appellate counsel arises out of counsel's failure to perfect a defendant's access to an appeal of right, this Court has employed *Strickland's* "reasonable competence" standard, but has not required a showing or prejudice, because the failure to perform the duties required to perfect an appeal cannot be a strategic decision. *Griffin, supra,* at 41-42. Prejudice is presumed; denial of an appeal of right justifies *a finding of prejudice per se*. The remedy for deprivation of access to appeal is simple

and efficient: Petitioner should have been permitted to raise the issues which were forfeited in the brief filed by first appellate counsel in the Michigan Court of Appeals during the direct appeal through subsequent post-conviction procedures. *Roe v. Flores-Ortega*, 528 U.S. 470 (2000).

Yet the Michigan Courts at every level refused to permit Petitioner to have an evidentiary hearing to establish record support for her claim she was effectively deprived of her right to appeal by the failure to her first appellate counsel to investigate the case and provide offers of proof in support of Petitioner's claim she was deprived of a fair trial by the deficient representation of trial counsel.

As discussed *supra,* once Petitioner replaced her first appellate counsel, her subsequent appellate counsel worked diligently to obtain and then present Petitioner's Affidavits and Offers of Proof at every level of the Michigan courts, in support of her request for an evidentiary hearing. They were presented in her direct appeal to the state court of appeals on Motion for Reconsideration, and to the state supreme court; and they were presented on subsequent review to the trial court, the state court of appeals, and the state supreme court. At every turn Petitioner has requested an evidentiary hearing to establish that the performance of both her trial counsel and her first appellate counsel was deficient, that the deficient performances prejudiced her, and that no claim of "trial strategy" could possible justify the manner in which trial counsel mishandled her case. The failure of the Michigan Courts to afford Petitioner an evidentiary hearing has made it impossible for Petitioner to even present her claims of violation of her right to due process and her right to counsel to the Courts for review. U.S. Const. Ams. V, VI, XIV.

Trial counsel completely failed to investigate Petitioner's case, or to interview and subpoena her witnesses. First appellate counsel completely failed to create a factual record to document Petitioner's claims of ineffective assistance of trial counsel by providing Affidavits or Offers of Proof. No evidentiary hearing was ever properly requested, or held. Once subsequent appellate counsel provided the appropriate Offers of Proof and Affidavits in support of a request for an evidentiary hearing, the state courts simply ignored them, thereby ignoring the legal standards established by this Court for review of such claims. Without an evidentiary hearing, the Courts below could not consider the real merits of the issues presented in Petitioner's direct appeal. Subsequent counsel subsequently provided offers of proof which made it clear a factual record is required, justified, and needs to be made here because it will establish that trial counsel provided ineffective representation.

CONCLUSION

For the foregoing reasons, Petitioner Natasha Latham respectfully requests this Court to grant his request for a Petition for a Writ of Certiorari, determine that the Michigan Supreme Court erred in upholding the refusal of the lower Michigan Courts to order an evidentiary hearing on the issue of ineffective assistance of both trial and first appellate counsel, and rule that Petitioner was improperly denied the opportunity to establish her claims at such a hearing, and remand this case to the Michigan Courts for further consistent proceedings, or grant other appropriate relief.

Respectfully submitted,

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